

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE V.K.MOHANAN
&
THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM**

FRIDAY, THE 27TH DAY OF FEBRUARY 2015/8TH PHALGUNA, 1936

OP (FC).No. 160 of 2014 (R)

**AGAINST THE ORDER IN I.A.NO.1720/2013 IN OP(GW) 947/2011 of THE FAMILY COURT,
KOTTARAKKARA**

PETITIONER:

**BINCY B.S.
D/O.BALAKRISHNAN, ISWARYA, KESAVAPURAM,
NAGAROOR P.O., KILIMANOOR, THIRUVANANTHAPURAM.**

BY ADV. SRI.B.MOHANLAL

RESPONDENT:

**S. RAJAN BABU
S/O.SHANMUGHOM, CHELLATHIL K.P. 8/323,
OONNAMPARA, DOORADARSAN ROAD, PEROORKADA
THIRUVANANTHAPURAM. PIN – 695 005**

**BY ADVS. SRI.R.RAJEEV (MELEVILA)
SRI.T.A.SREE KUMAR**

**THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 27-02-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

OP (FC).No. 160 of 2014 (R)

APPENDIX

PETITIONER'S EXHIBITS:

- EXT.P1 :** THE TRUE COPY OF THE JUDGMENT IN OP NO.302/2007 DATED 30-06-2009 OF THE FAMILY COURT, NEDUMANGAD
- EXT.P2 :** THE TRUE COPY OF THE JUDGMENT DATED 29-06-2009 IN OP NO.550/2007 OF THE FAMILY COURT, NEDUMANGAD
- EXT.P3:** THE TRUE COPY OF THE ORDER DATED 03-10-2009 IN IA NO.2278/2009 IN OP NO.550/2007 OF THE FAMILY COURT, NEDUMANGAD.
- EXT.P4:** THE TRUE COPY OF THE ORDER DATED 29-08-2011 IN TR.P. (C) NO.63/2011 OF THIS HON'BLE COURT.
- EXT.P5:** THE TRUE COPY OF THE IA NO.1720/2013 IN OP(G&W)NO.947/2011 FILED BY THE PETITIONER BEFORE THE FAMILY COURT, KOTTARAKKARA
- EXT.P6 :** THE TRUE COPY OF THE OBJECTION DATED 08-11-2013 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT, KOTTARAKKARA
- EXT.P7:** THE TRUE COPY OF THE ORDER DATED 24-12-2013 IN IA NO.1720/2013 IN OP(G&W)NO.947/2011 OF THE FAMILY COURT, KOTTARAKKARA.

RESPONDENT'S EXHIBITS

- EXT.R1:** TRUE COPY OF THE COMPROMISE PETITION IN I.A.NO.1706/2009 IN O.P.NO.550/2009.
- EXT.R2:** TRUE COPY OF THE OBJECTION TO THE EXT.P5 PETITION.

/TRUE COPY/

P A TO JUDGE

MJL

V.K.MOHANAN & C.K. ABDUL REHIM, JJ.

O.P.(FC)No.160 of 2014

Dated this the 27th day of February, 2015

JUDGMENT

Mohanan, J.

The mother of the ward namely Bincy B.S. preferred the above Original Petition challenging the common order dated 24/12/2013 in IA No.1720/2013 in O.P(GW) No.947/2011, by which the learned Judge of the Family Court, Kottarakkara found that OP(GW) No.947/2011 is maintainable and accordingly the above referred IA is disposed of.

2. Heard the counsel for the petitioner and the respondent.

3. According to the learned counsel for the petitioner due to the strained relationship between the petitioner and the respondent who are respectively the wife and husband, several litigations were instituted in the court below. The petitioner wife filed O.P No.302/2007 for divorce, custody of the minor ward, injunction and consequential reliefs. She has also filed O.P No.550/2007

for recovery of money, gold ornaments, maintenance and also sought consequential reliefs before the Family Court, Nedumangad, Thiruvananthapuram. According to the petitioner, the above cases were settled between the parties and the marriage of petitioner and respondent was dissolved on mutual consent under Section 13(B) of the Hindu Marriage Act, 1955 as per the judgment dated 30/06/2009 in OP No.302/2007 of the Family Court, Nedumangad. It is the specific case of the petitioner that Section 13(B) petition was filed in terms of the settlement arrived at and as per the said settlement, there is a provision regarding the custody of the child. So, according to the learned counsel, after having entered into an agreement, the respondent is barred from filing O.P (GW) No.947/2011 and as such, the said petition is not maintainable. Therefore, the petitioner approached the court below by filing IA No.1720/2011 raising the question relating to the maintainability of O.P(GW) No.947/2011 before the Family Court, Kottarakkara.

4. According to the learned counsel for the

petitioner, as the custody of the child was given to the petitioner, based upon a settlement arrived between the parties, O.P (GW) No.947/2011 filed by the husband before the court below is not maintainable. On the other hand, the learned counsel appearing for the respondent pointed out that even after the settlement the respondent husband approached the Family Court by filing Interlocutory Applications for interim custody and also for modification of orders passed by the court below and at that point of time no such contention was raised.

5. We have carefully considered the rival submissions made by the counsel for the petitioner as well as the respondent.

6. In the impugned order, the learned Judge of the Family Court had specifically found that though there was a settlement between the petitioner and the respondent there was no specific term or no determination about the permanent custody of the child. It is also found that at the time when the said settlement was arrived at, the ward was only at the age of two years. On a perusal of

the records and particularly the impugned orders, it appears that though there was no specific understanding and settlement about the permanent custody of the child, the custody of the child was given to the petitioner, considering the tender age of the child at the time of the settlement. That does not mean that due to the subsequent change of circumstances either of the parties are not entitled to approach the Family Court for interim or permanent custody of the child.

7. As rightly found by the learned Judge of the Family Court, the so called settlement of compromise is not barred either by *res judicata* or by limitation. As long as the right to permanent custody of the ward is not fixed or decided, we are of the view that either of the parties can approach the competent court with such a prayer and it is for that court to consider that prayer and to pass appropriate orders. So, we find no reason to interfere with the order impugned in this Original Petition.

In the result, this Original Petition is dismissed. However it is open to the petitioner as well as the

respondent to advance their respective contentions and to produce evidence, if any, before the said court in support of such contentions. The learned Judge of the Family Court, Kottarakkara is directed to dispose of O.P (GW) No.947/2011 in accordance with law and procedure and after affording sufficient opportunities to the parties to present their case.

Sd/- **V.K.MOHANAN**
JUDGE

Sd/- **C.K. ABDUL REHIM**
JUDGE